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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

IN RE: CHECKING ACCOUNT OVERDRAFT LITIGATION **MDL No. 2036**	**Case No. 1:09-md-2036-JLK** **JUDGE:** **HON. JAMES LAWRENCE KING**

THIS DOCUMENT RELATES TO:

Waters, et al. v. U S. Bank, N A.
S.D. Fla. Case N o. 1:09-cv-23034-JLK
N .D. Cal. Case No. 09-2071-JSW

Speers, et a1. v. U.S.. Bank, NA.
S.D. Fla. Case No. 1 :09-cv-23126-JLK
I). Or. Case No. 3:09-cv-00409-HU

Brown v. U S. Bank, N A.
S.D. Fla. Case No. 1:10-24147-JLK
E.D. W ash. Case No. 2:10-00356-R1H P

OBJECTIONS TO U.S. BANK CLASS ACTION SETTLEMENT

INTRODUCTION

This is a settlement designed to benefit attorneys, not class members. The attorneys are asking for over $16 million; the class will get far less than $39 million, because the settlement creates new liabilities for class members that offset much of the alleged class benefit. Yet the attorneys—who took only two depositions and reviewed only 21,000 documents, are getting thousands of dollars an hour, as if they have won a great victory. Even if one assumes that the class will receive all $38.5 million available to it, the class is receiving less than 10 cents on the dollar for the settlement. The class is being asked to settle, while class counsel is asking to be paid as if it has won an enormous victory. This is wrong. The fees must be reduced to reflect the actual value of the class; given that every overdraft litigation has settled for a multiple of lodestar, it would be abusive to pay more than lodestar here, because class counsel faced no real risk. Indeed, it would be abusive to pay lodestar here, because class counsel, instead of competing to provide the class the best bargain, have colluded to not challenge one another and instead split up the pot at the class's expense: this litigation did not require the over dozen firms that will collect at the class's expense here.

The settlement is also objectionable because the fee allocation provisions violate Rule 23, because the class has failed to receive notice of the secret side agreement that will govern fee allocation here, and because the preliminary approval order creates unfair

burdens to objecting. This is a settlement designed to benefit class counsel, not class members.

I. OBJECTORS ARE CLASS MEMBERS

According to the U.S. Bank settlement notice, members of the Settlement Class include current or former consumers who:

a) Had a U.S. Bank consumer deposit account that they could access with a U.S. Bank debit card during the applicable Class Period; and

b) each was charged one or more overdraft fees as a result of U.S. Bank's practice of posting debit card transactions from highest to lowest dollar amount.

Each of the following four (4) objecting class members ("Objectors") had two or more overdraft fees caused by debits posted to his or her U.S. Bank consumer deposit account on a single day. Objectors file this objection to the litigation known as *In re: Checking Account Overdraft Litigation*, No. 1:09-md-2036-JLK.

1) Erica Rutherford objects to the U.S. Bank Settlement in the above referenced matter on the grounds stated below. Objector Rutherford is a class member. She received a postcard via USPS mail stating that she is a class member (Exh. B). Her name, address and phone number are as follows:

Erica A'dell Rutherford
4650 North Rainbow Boulevard
Las Vegas, Nevada 89108
(479) 622-9074

Objector Rutherford opened a U.S. Bank consumer deposit account in Perryville, Arkansas in approximately 2003 that she accessed with her U.S. Bank debit card. That account is still

open. Objector Rutherford has never filed an objection in a class action lawsuit nor has she ever served as an objector in a class action lawsuit. See Rutherford Declaration (Exh. C).

2) Ahmed Raed objects to the U.S. Bank Settlement in the above referenced matter on the grounds stated below. Objector Raed is a class member. He has declared that he clearly recalls instances where U.S. Bank assessed his account with multiple overdraft fees in a single day as a direct result of debiting transactions from highest to lowest amounts. Objector Raed has never filed an objection in a class action lawsuit nor has he ever served as an objector in a class action lawsuit. See Raed Declaration (Exh. D). His name, address and phone number are as follows:

Ahmed N. Raed
1398 Ridgecrest Street
Monterey Park, California 91754
(213) 324-8087

Objector Raed opened a U.S. Bank consumer deposit account in Glendale, California in approximately 2008 or 2009. He closed that account in approximately 2010.

3) Jill Radtke objects to the U.S. Bank Settlement in the above referenced matter on the grounds stated below. Objector Radtke is a class member. She received a postcard via USPS mail stating that she was a class member (Exh. E). Objector Radtke has never filed an objection in a class action lawsuit nor has she ever served as an objector in a class action lawsuit. Her name, address and phone number are as follows:

Jill Marie Radtke

6905 S. Juniper Drive
Oak Creek, Wisconsin 53154

(414) 218-0650
Objector Radtke opened a U.S. Bank consumer deposit account in Wisconsin in approximately 2000 that she accessed with her U.S. Bank debit card. That account is still open.

4) Jason Waters objects to the U.S. Bank Settlement in the above referenced matter on the grounds stated below. Objector Waters is a class member. He has declared that he clearly recalls instances where U.S. Bank assessed his account with multiple overdraft fees in a single day as a direct result of debiting transactions from highest to lowest amounts. Objector Waters has never filed an objection in a class action lawsuit nor has he ever served as an objector in a class action lawsuit. See Waters Declaration (Exh. F). His address and phone number are as follows:

Jason Lynn Waters
4826 Germania Avenue
St. Louis, Missouri 62116
(618) 604-1377

Objector Waters opened a U.S. Bank consumer deposit account in Illinois in approximately 2003. He closed that account in early 2013.

II. THE $55 MILLION COMMON FUND IS ILLUSORY

The $55 million common fund is illusory because only a small fraction of that money is actually going to the class.

The court should make a determination of the fairness of this settlement based on the amount of money that the class will actually receive. In *In re Baby Products Antitrust Litig.*, 708 F.3d 163 (3d Cir. 2013), the Third Circuit held that a district court in calculating

attorneys' fees must value a settlement based on what the class actually received, not on what the class hypothetically could receive. *Accord In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1182 (9th Cir. 2013). Under *Baby Products* and related principles, costs and expenses should not be considered "recovery" in the percentage-of-recovery method. Thus, the correct rule of law is that percentage of recovery is to be based on the recovery, not some imaginary number inflating what recovery might be. The 2003 amendments to Rule 23 and other recent authority make it clear that this is not just good law, but good public policy. See Notes of Advisory Committee on 2003 Amendments to Rule 23 ("it may be appropriate to defer some portion of the fee award until actual payouts to class members are known" (emphasis added)); id. ("fundamental focus is the result actually achieved for class members" (emphasis added); American Law Institute, Principles of the Law of Aggregate Litigation, §3.13 (2009); Federal Judicial Center, Manual for Complex Litigation (Fourth) § 21.71 (2004) ("the fee awards should be based only on the benefits actually delivered." (emphasis added)).

There are a number of provisions that reduce the amount of the $55 million common fund that will not be received by class members, therefore cannot be deemed a benefit to the class on which attorneys' fees will be based. The settlement mandates that Defendant will be reimbursed for all administration fees and costs from any remaining residual funds. Settlement at 39, para. 116. It is only after the Defendant has been fully reimbursed for these out-of-pocket costs that the settlement class will receive a *pro rata* distribution of remaining funds. The Defendant is essentially taking about part of the common fund, thus

cannot call that a class benefit. It is reasonable to expect that with a class period dating back to 2003 that there will be a significant amount of settlement checks that will not be received due to U.S. Bank's inability to locate former account holders. It is clear that Defendant will recoup financial benefit from this settlement, thereby insuring that part of the common fund will never go to class members.

Another settlement provision highly beneficial to Defendant and adding to the illusory nature of a $55 million fund is the offset clause. Settlement at 33-34, para. 106(h),(i). Defendant has negotiated the right to reduce "dollar-for-dollar" the payouts of class members who closed accounts with unrecovered negative balances. From 2003 to 2010, U.S. Bank would have written off these "uncollectable accounts" and received tax benefits as a result. So for Defendant to benefit again at the expense of class members is essentially double-dipping. So it is guaranteed that a certain percentage of the $55 million settlement fund will not go to the class, thus cannot be considered a benefit for the purposes of assessing the fairness of an attorneys' fee award.

The calculation of the value of the settlement must be the *incremental* benefit to the class member versus what they would have received if there was no settlement. *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 286 (7th Cir. 2002). If U.S. Bank invents a new liability of $70 as part of the settlement to offset a $100 payment to a class member, and the attorney receives the other $30, the class member is no better off than it was before the settlement. It would be reversible error to include this in the settlement value, much less to give class counsel a $30 commission for the new liability to U.S. Bank from the class member.

III. 30% OF $55 MILLION IS EXCESSIVE GIVEN LOW RISK

The Eleventh Circuit has stated that there is "no hard and fast rule mandating a certain percentage of a common fund" and that a fee award is specific to the "facts of each case." *Waters v. Intern. Precious Metals Corp.,* 190 F.3d 1291, 1294 (11th Cir. 1999) quoting *Camden I Condominium Ass'n, Inc. v. Dunkle,* 946 F.2d 768, 774 (11th Cir. 1991). That court went on to state that the "majority of common fund fee awards fall between 20% to 30% of the fund." *Id*. The district courts have been instructed to view this range as a "benchmark" which "may be adjusted in accordance with the individual circumstances of each case" using *Johnson* factors. *Id.* at 775.[1]

Even we were to assume that the settlement fund was worth $55 million to the class, 30% is plainly excessive here.

First, given the zero risk assumed by class counsel, in light of the fact that class counsel has already received tens of millions of dollars of fees in identical litigation, 30% fee of the $55 million settlement fund is too high. Class counsel is split among countless attorneys who colluded to share fees instead of compete for them. Yet only two depositions were taken and only 21,000 documents were reviewed. Even if half an hour were spent reviewing each document (an excessive amount, given that most documents were likely

[1] *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir.1974) instructs that district court should consider twelve factors in determining attorneys' fee awards: (1) time and labor, (2) novelty and difficulty of the questions, (3) requisite skill, (4) preclusion of other employment, (5) customary fee, (6) fixed or contingent fee, (7) time limitations, (8) amount involved and results obtained, (9) experience, reputation and ability of attorneys, (10) "undesirability" of the case, (11) nature and length of professional relationship with client, and (12) award in similar cases.

entirely irrelevant), that is well over $1000/hour. The issues in this case were already litigated and researched in earlier cases where class counsel was handsomely compensated. Class counsel should not be allowed to double-dip.

According to Plaintiffs' own expert reports, the class here will only recover 13% of the available damages, which is less than similar classes have received in similar banking settlements. Here, as in other cases, "the class is being asked to 'settle,' yet Class Counsel has applied for fees as if it had won the case outright." *Richardson v. L'Oreal USA, Inc.* 2013 WL 5941486 (D.D.C., Nov. 6, 2013, CV 13-508 (JDB)) quoting *Sobel v. Hertz*, No. 06–545, 2011 WL 2559565, at *14 (D. Nev. June 27, 2011).

While the Eleventh Circuit holds that "30%" is a benchmark value, this is higher than other circuits. Objectors reserve the right to request the Eleventh Circuit to adopt law that reconciles the Eleventh Circuit standard with those of the Supreme Court, which holds that lodestar is a presumptively reasonable fee. *See Perdue v. Kenny A*. In the alternative, the Eleventh Circuit should adopt the Seventh Circuit's market mechanism approach. Even a ten percent fee would be appropriate in a case like this one, where class counsel faces no risk, where the alleged baseline of settlement value is large, and where there were multiple class counsel willing to take on the case. Had this Court required class counsel to compete on price, rather than collude, it could have obtained competent Rule 23(g) representation for the class willing to work for a much smaller multiple of lodestar—and could have litigated much more efficiently as a single firm, rather than as over a dozen trying to coordinate.

Objection is made to the expert reports offered by plaintiffs. These expert reports are inadmissible and it would be reversible error for this Court to rely upon them. These reports make legal arguments and conclusions yet package them as evidence. It is not a controversial proposition that experts cannot testify about legal conclusions. *Kreit Mechanical Associates, Inc. v. C.I.R,.* 137 T.C. 123, 131 (T.C. 2011) quoting *Snape–Drape, Inc. v. Commissioner,* 105 T.C. 16, 20, 1995 WL 412145 (1995), affd. 98 F.3d 194 (5th Cir.1996) ("an expert's opinion is not admissible if it contains improper conclusions as to issues of law and not fact.")

IV. SECTION 122 OF THE SETTLEMENT AGREEMENT VIOLATES RULE 23

Under Rule 23(h), the Court is responsible for allocating attorneys' fees amongst all class counsel. Yet under Section 122 of the Settlement, class counsel is entitled to make a secret extrajudicial arrangement to distribute attorneys' fees. Secret side agreements are impermissible in class actions. FRCP 23(e)(3).

In re High Sulfur Content Gasoline Prod. Liab. Litig., 517 F.3d 220 (5th Cir. 2008), is informative. There, the district court permitted *ex parte* submissions as to the allocation of the fee award among multiple law firms. This was reversible error: the fee request of *each* law firm is subject to Rule 23(h) hearings. A court must "closely scrutinize the attorneys' fee allocation, especially when the attorneys recommending the allocation have a financial interest in the resulting awards." Id. at 227 (5th Cir. 2008). For a district court to allocate fees in an ex parte proceeding was "inconsistent with well-established class action principles and basic judicial standards of … fairness," namely in an ex parte proceeding. Id.

Here, there is not even an *ex parte* hearing; the district court is divorced from the allocation decision entirely, and class counsel decides amongst themselves on the basis of illegal side deals who gets what. If a district court is not permitted to delegate fee awards in an extrajudicial proceeding, then surely under *High Sulfur*, private law firms should not be permitted to perform such a delegation. It is impossible to reconcile this with the High Sulfur requirement that the allocation be done openly by the court. Class counsel's assertion that there is no dispute amongst the class counsel who will get the money is irrelevant. If one of the law firms has secretly agreed to accept less than lodestar or a smaller multiplier, it is the class that is entitled to that giveback, not the law firm that has secretly extracted a return greater than that approved by the Court. *Cf. Bluetooth*, 654 F.3d 935, 949 (9th Cir. 2011) (givebacks to parties instead of class is a sign of impermissible self-dealing because "there is no apparent reason the class should not benefit from the excess allotted for fees"); cf. also Fed. R. Civ. Proc. 23(e)(3) (forbidding secret side agreements in class action settlements).

While class counsel can no doubt point to other district courts that disregarded Rule 23(e)(3), 23(h), and the *High Sulfur* precedent, there is no reason to think that the Eleventh Circuit will not follow the law or that the Eleventh Circuit will create a circuit split. The settlement is illegal and cannot be approved; the failure of class counsel to submit a proposed allocation in their fee request means the fee request cannot be approved. *See also In re Mercury Interactive Sec. Litig.*, 618 F.3d 988 (9th Cir. 2010) (reversible error if class has not had fair opportunity to evaluate individual fee requests).

V. OTHER OBJECTIONS

Objection is made to service awards to twelve (12) named plaintiffs in an amount of $10,000 each, or $10,000 for a married couple, as excessive; this is a violation of Rule 23(a)(4). *See In re Dry Max Pampers Litig*., 724 F.3d 713 (6th Cir. 2013).

Objection is made that class counsel did not post the fee request on the settlement website in advance of the objection deadline.

The procedures to object and the information sought from Objectors and their counsel in order to object are improper and therefore they are objected to herein as set forth below. Information is sought from Objectors and their counsel that have no bearing on the merits of this objection or Objector's standing. To the extent the proponents of this settlement are interested in "motive," which while not an appropriate area of inquiry, Objectors wish to say the following: Objectors will agree to a court order that goes beyond the requirements of the Federal Rules and requires that, should a settlement involving Objectors and/or their objections occur in the future in this matter, that the District Court must approve the settlement, even if it occurs on appeal.

Objection is made to any procedures or requirements to object in this case that require information or documents other than those that are contained herein on grounds that such requirements seek irrelevant information to the objections, are unnecessary, unduly burdensome, are calculated to drive down the number and quality of objections to the settlement and violate objectors' and counsel's due process rights and/or Rule

23(e)(5). These objections apply to the numerous requests for information about Objectors and/or their counsel other than those necessary to establish standing of the Objectors.

Objection is made by Objector's counsel and Objectors to the extent the requirements to object would seek information and data covered by any of the following: attorney client privilege, attorney work product immunity, and/or confidential and proprietary business information privileges and immunities.

Objection is made to the requirement of a signature of Objectors where they are represented by counsel as unduly burdensome and violating the right of the objectors to hire counsel and for counsel to sign pleadings for clients.

Objection is also made to the extent any specific procedures to object were not specifically listed in the text of the Class Notice (such as the attempt to incorporate by reference paragraphs 88-89 of the Settlement Agreement) and objection is further made to the extent the Class Notice references procedures contained in an Amended Settlement Agreement that did not exist at the time of Preliminary Approval or at the time the Class Notice was disseminated.

VI. FAIRNESS HEARING

Neither Objectors nor their counsel have any plans to attend the Fairness Hearing, but each reserves the right to attend and to cross-examine witnesses.

VII. INCORPORATION BY REFERENCE OF OTHER OBJECTIONS

Objectors incorporate by reference any other objections filed that are not inconsistent with this one.

Dated: November 13, 2013

Respectfully submitted,

By: __s/ Alex D. Funes_____

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PROOF OF SERVICE

I certify that a true and correct copy of the foregoing document has been forwarded to the Clerk of Court for the Southern District of Florida and all counsel via CM-ECF filing on this the 13th day of November, 2013. The Clerk and the participants listed below also have been served a copy of the foregoing document via USPS First Class mail, postage prepaid.

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